

69-3100-8627-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Peter J. Nikitas,

Petitioner,

RECOMMENDATION OF
DISMISSAL FOR LACK OF

v.
JURISDICTION

Sixth Judicial District,

Respondent.

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on the Judge's own motion to determine jurisdiction. Neither party requested oral argument.

Peter J. Nikitas, Attorney at Law, 1507 Tower Avenue, Suite 301, Superior Wisconsin 54880-2562 submitted memoranda on his own behalf. Steven M. Gunn, Assistant Attorney General, NCL Tower, 445 Minnesota Street, Suite 1100, St. Paul, Minnesota 55101-2128 submitted memoranda on behalf of the Sixth Judicial District. The record closed on this motion on April 7, 1994, upon receipt of supplemental memoranda from the parties.

Based on the record herein, and for the reasons set out in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs DISMISS the Petition of Peter J. Nikitas for relief under the Veteran's Preference Act for lack of jurisdiction.

Dated: April 28, 1994.

/s/

STEVE M. MIHALCHICK
Administrative Law Judge

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Veteran's Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner.

Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, 20 West 12th Street, St. Paul, Minnesota 55155-2079. Questions should be directed to Gerald Bender, telephone number (612) 297-5828.

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Among the duties of an Administrative Law Judge in a contested case is to determine if a case should be dismissed. Minn. Rule 1400.5500(K). An agency's jurisdiction is limited in scope to the powers granted by statute. *McKee v. Ramsey County*, 245 N.W.2d 460 (Minn. 1976) (citing *State ex rel. Spurck v. Civil Service Bd.*, 32 N.W.2d 583, 586 (Minn. 1948)). Where jurisdiction is lacking, the case must be dismissed. See *In the Matter of Emmanuel Nursing Home*, 411 N.W.2d 511, 516 (Minn.App. 1987). In this matter, the Administrative Law Judge determined that jurisdiction was an issue and invited the parties to brief the issue.

Right to a Hearing

Certain rights are afforded to honorably discharged veterans of the armed forces of the United States. Among those rights is a prohibition against removal from classified civil service positions except for reasons of incompetency or misconduct. Minn. Stat. 197.46. This prohibition extends to positions "in the several counties, cities, towns, school districts and all other political subdivisions in the state" *Id.* There is no separate right to discharge only for cause shown at a hearing for veterans in state employment. State employees, including veterans, have such rights under a collective bargaining agreement, if applicable, and Minn. Stat. 43A.33, subd. 3. Such rights are extended only to "permanent classified employees." *Id.*

Petitioner's Employment Status

Petitioner served on active duty with the United States Navy from May 26, 1982, to May 20, 1987, and received an honorable discharge.

Petitioner was hired as Assistant District Public Defender in the Sixth Judicial District, beginning on July 1, 1992. In 1993, Petitioner held the position on a part-time basis. Petitioner was informed by letter, dated December 13, 1993, that he would be terminated effective January 25, 1994.

Petitioner's wages for 1992 were paid by St. Louis County. Petitioner's Supplemental Memorandum, Exhibit 1 (1992 W-2 form). Later, Petitioner was paid by the State of Minnesota. Petitioner's Memorandum, at 2; see also Exhibit 3 ("the state will pay").

On August 1, 1993, Minn. Stat. 611.265 took effect. Item a of that statute states:

District public defenders and their employees, other than in the second and fourth judicial districts, are state employees in the judicial branch, and are governed by the personnel rules adopted by the state board of public defense.

Minn. Stat. 611.265(a).

Respondent argues that the effect of Minn. Stat. 611.265 is to move Petitioner to the unclassified civil service of the State and that, as a state employee, Petitioner has no right to a veteran's preference hearing. Petitioner asserts that his right to a hearing under Minn. Stat. 197.46 survived the change of employer. In the alternative, Petitioner argues that the Sixth Judicial District is a political subdivision of the State and thus Respondent remains obligated to provide a hearing before removing a veteran under Minn. Stat. 197.46.

Primacy of the Veterans' Preference Act

Petitioner cites Minn. Stat. 197.48 to support his argument that he retains a right to a hearing after becoming a state employee. That statute states:

No provision of any subsequent act relating to any such appointment, employment, promotion, or removal shall be construed as inconsistent herewith or with any provision of sections 197.455 and 197.46 unless and except only so far as expressly provided in such subsequent act that the provisions of these sections shall not be applicable or shall be superseded, modified, amended, or repealed. Every city charter provision hereafter adopted which is inconsistent herewith or with any provision of these sections shall be void to the extent of such inconsistency.

Minn. Stat. 197.48.

This statute was interpreted in *State ex rel. Caffrey v. Metropolitan Airports Commission*, 246 N.W. 637 (Minn. 1976). In that case, the "at will" employment provisions of the Metropolitan Airports Commission authorizing statute were held to be subordinate to the veterans' rights contained in the Veterans'

Preference Act. Caffrey, 246 N.W.2d at 639-40. The subordination of the subsequent statute arises from the direct conflict between the two statutory standards applicable to the position.

Where there is a conflict, the Veterans' Preference Act must be applied, unless specifically superseded. Under Minn. Stat. 611.265(a), district public defenders and their employees are state employees, except in the Second and Fourth Judicial Districts. State employees do not fall within the scope of Minn. Stat. 197.46. The statute does not conflict with the Veterans' Preference Act and, therefore, Minn. Stat. 197.48 is not applicable in this case.

Sixth Judicial District as Political Subdivision

Minn. Stat. 197.46 expressly affords a pretermination hearing right to veterans employed by political subdivisions. Petitioner maintains that the Sixth Judicial District is a political subdivision because it is subordinate to the Court of Appeals and the Supreme Court, the counties within the District bear its costs, public defender services which cross district boundaries are prorated to the districts and borne by their respective counties, and judges stand for election at six year intervals.

In Dahle v. Red Lake Watershed District, 354 N.W.2d 604 (Minn.App. 1984), the Court of Appeals applied the statutory definition of "political subdivision" to veterans' preference cases. "Political subdivision" is defined as:

any agency or unit of this state which now is, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied.

Minn. Stat. 471.49, subd. 3.

Under Minn. Stat. 471.49, subd. 3, the taxation power determines whether or not an entity is a political subdivision. Under the Minnesota Constitution, governmental power is divided among legislative, executive, and judicial branches. Minn. Const. Art. III, 1. The powers granted to each branch cannot be exercised by any other branch of government. Id. Taxation is a power within the legislative branch. Reed v. Bjornson, 253 N.W. 102 (Minn. 1934).

To constitute a political subdivision for the purposes of the Veterans' Preference Act, the entity must be capable of levying taxes. The Sixth Judicial District is a subdivision of the judicial branch. The judicial branch is precluded from exercising taxation power by the Minnesota Constitution. Minn. Const. Art. III, 1. The Sixth Judicial District is constitutionally precluded from meeting the definition of "political subdivision."

County Payment of Public Defender Costs

The payment of costs by the counties contained within the boundaries of the Sixth Judicial District does not determine the

District's status or the status of its employees. Most of the staff employed in the District Courts were made state employees by Minn. Stat. 480.181. The effect of county payments to the judicial branch was discussed in *Steiner v. Sullivan*, 77 N.W. 286 (Minn. 1898). In that case, Ramsey County was required to pay \$1,500 to each judge in that County's District Court. The Court stated:

It is true that the judges of the district court belong to the judicial department; that it is incumbent on the state to provide for the payment of their salaries; but it does not logically follow that it can make payment of their salaries a charge only upon the state treasury. There is nothing in the constitution to prevent the legislature from making the salaries of the judges of the district courts a charge upon their respective districts.

Steiner, 77 N.W. at 287.

St. Louis County is required to pay certain court expenses under Minn. Stat. 484.45. The costs of a district's public defender are made charges upon those counties comprising that judicial district. Minn. Stat. 611.27, subd. 1. Under the holding in *Steiner*, there is no change in the employer/employee relationship based solely on which entity is required to pay salary or costs. The arrangement of payments to the District is a legislative allotment, not an exercise of the taxation power by the District.

Petitioner is not an employee of a political subdivision. The Veterans' Preference Act extends the right to a pretermination hearing to employees of counties, cities, towns, and other political subdivisions. Petitioner does not have the right to a pretermination hearing under the Veterans' Preference Act.

Jurisdiction

The enforcement provision of the Veterans' Preference Act states:

A veteran who has been denied rights by the state or any political subdivision, municipality, or other public agency of the state under sections 43A.11, 197.46, 197.48 or 197.455 may petition the commissioner of veterans affairs for an order directing the agency to grant the veteran such relief the commissioner finds justified by said statutes....

Minn. Stat. 197.481, subd. 1.

A veteran is eligible to petition the Commissioner of Veterans Affairs if any veterans' preference rights have been denied that veteran. Under the foregoing analysis, the Judge concludes that, as a matter of law, no veterans' preference right was infringed by the actions of the Sixth Judicial District in this matter. With no infringement of a veteran's preference right, there is no statutory basis for the Petition herein. Without a statutory basis for the Petition, the Commissioner lacks

jurisdiction over this matter and the Petition must be DISMISSED.

S.M.M.